All in all, I say that to allow the plaintiff this application is to allow him to go against his undertaking to produce his clean 1990 accountant's report and to allow him to walk away from a joint responsibility in the management of his previous firm.

I also find merit in the argument of the defendant's Counsel that the taking of disciplinary action under s. 88A of the Act is inappropriate as the plaintiff is not in possession of a practising certificate and the proper step to be taken is a preventive one until he can accept his responsibility to furnish a clean accountant's report as required by the Act, he should be denied the Sijil Annual and a practising certificate.

The question to be answered by the Court is simply, would any advocate, applying for a Sijil Annual for 1992 in the same circumstances as the plaintiff, not being able to produce a clean accountant's report for the year 1990, have been granted by the Bar Council the Sijil Annual? The answer to the Court is quite obvious - no. Why should the plaintiff be treated differently? The reason why he had been granted the Sijil Annual for 1992 and 1993 was because of his tacit undertaking to produce what was required and the Bar Council accommodated him.

For the reasons given, this Court dismissed the plaintiff's application with costs.

YONG KOK LAM & ANOR.

v.

PONMUGAM & CO. (SUING AS A FIRM)

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABU MANSOR BIN ALI J.
[CIVIL APPEAL NO. R8-11-39 OF 1990]
6 JULY 1993

PRACTICE & PROCEDURE: Application for summary judgment - Whether there were triable issues - Appeal against decision of Magistrate.

The plaintiff/respondent filed a claim in the Magistrates' Court claiming that the defendant/appellants had agreed to settle the plaintiff's fees and disbursements for the work done by the plaintiff in bringing an action. The defendant did not file a statement of defence and the plaintiff obtained summary judgment on the claim.

On the defendant's appeal against the decision of the learned Magistrate, the defendant contended that the Magistrate had no jurisdiction to hear the matter. The defendant argued that as there was no agreement as to how much the plaintiff was to be paid as required by s. 116 of the Legal Profession Act 1976 (the Act) the plaintiff should have brought his claim for determination in the High Court as required by s. 118 of the Act.

Defendant's Counsel further argued that as the plaintiff's claim was based on "in consideration of your having released the file to our new solicitors" the consideration was past consideration and void and relied on illustration (c) of s. 80 of the Contracts Act 1950. The other point raised at the appeal was that the Magistrate had allowed costs for advocacy where this was clearly disallowed by O. 48 r. 28(1) of the Subordinate Courts Rules 1980.

Held:

[1] There were merits in the argument of Counsel for the defendant. The defendant has raised triable issues and the case should not have been disposed of summarily under O. 26A of the Subordinate Courts Rules 1980.

[Appeal allowed. Judgment of Magistrate set aside with costs].

Legislation referred to:
Contracts Act 1950, s. 80
Legal Profession Act 1976, ss. 116(1), (2), 118(1), 120
Subordinate Courts Rules 1980, O. 26A, O. 48 r. 28(1)

For the appellants - D. Ganaeswaren; M/s. D. Ganaeswaren & Co.
For the respondent - Sa. Ponmugam; M/s. Ponmugam & Co.

JUDGMENT

Haji Abu Mansor Bin Ali J:
This is an appeal by the plaintiff/respondent against my decision given on 3 August 1992 where I allowed the defendant/appellants' appeal with costs on the ground that the defendant managed to raise triable issues in the case.

In the Magistrate's Court the plaintiff, in paragraph 7 of his statement of claim prayed for judgment in the sum of RM13,000 because, as pleaded in para 5 of the said claim the defendant had agreed to pay and settle the plaintiff's fees and disbursements for work done by the plaintiff in bringing an action. In para 6 of the claim through a letter of undertaking dated 2 July 1988 the 1st defendant in his personal capacity undertook to pay the RM13,000 - the solicitor's fees. The Bill dated 2 July 1988 was for RM15,000 but RM2,000, as stated in the statement of claim, had been paid.

In para 8 of the statement of claim plaintiff also claimed RM3,225 for further additional work at the defendant's request in connection with Bills dated 5 August 1988 for RM550 and another Bill also dated 5 August 1988 for RM2,675, the total being RM3,225. In the Court below the plaintiff prayed for final judgment under O. 26A and obtained judgment for RM16,225 (RM13,000 plus RM3,225). It was noted that no statement of defence was filed.

The appellant/defendant has 7 grounds of appeal but before me only proceeded on 3(a)(b) and (c). Under ground 3(a) the appellant alleges the learned Magistrate has no jurisdiction in this matter. The jurisdiction belonged to the Senior Assistant Registrar. Section 116 of the Legal Profession Act 1976 provides:

116. Advocate and solicitor may enter agreement for costing contentious business.

(1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.

(2) Every such agreement shall be signed by the client and shall be subject to this Part.

For the enforcement of the agreement s.118 of the Legal Profession Act provides:

118. Enforcement of agreements.

(1) No action or suit shall be brought or instituted upon any agreement as is referred to in s. 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the Court in which the business or any part thereof was done, or a Judge of the Court, or, if the business was not done in any Court, then by the High Court or a Judge of the High Court.

And by s. 120 a client may change his solicitors and according to p. 97 of the Appeal Record such change of solicitors did take place. On 2 July 1988 at p. 97 of the Appeal Record there was a letter of undertaking from the 1st defendant dated the 2 July 1988.

The appellant argued further that since there is no agreement as to how much the plaintiff was to be paid as required by s. 116, the plaintiff should not have brought an action in the Magistrate's Court but should have brought his claim for determination in the High Court as required by s. 118 of the Legal Profession Act. Counsel further argued that since the plaintiff was barred from bringing an action by the said s. 118 thereof there should have been an application that the case be transferred to the High Court by the Magistrate, he argued.

Under ground 3(b) and (c) taken together, the 1st defendant guaranteed to pay the fees of the 2nd defendant, up to RM13,000. Defendant's

Counsel argued two issues would arise from this, which is, whether the guarantee was valid and if so, what is the extent of the defendant's liability bearing in mind that the limit of his guarantee was only RM13,000.

In this case the defendant's Counsel submitted the plaintiff upon obtaining the order went on to seize the 1st defendant's property for RM16,225 after seizure done on 9 January 1992. At p. 69 of the Appeal Record there is evidence that there was payment into Court made by the 1st defendant of RM20,372 on 23 January 1990 made up of RM16,225 plus Court's commission of 2% plus costs and interest.

On the issue of validity, defendant's Counsel submitted that s. 80 illustration (c) of the Contracts Act provides that past consideration is void as it is no consideration. At p. 97 of the Record of Appeal it is stated that the claim was based on "In consideration of your having released the file to our new Solicitors". This is clearly past consideration and void.

On ground 3(f) the defendant's Counsel submitted that the cost should be awarded by the High Court. Order 48 r. 28(1) of the Subordinate Courts Rules 1980 provides:

> 28(1) No costs for advocacy shall be allowed where the plaintiff enters judgment under O. 14, r. 2 or 3 or under O. 26A or where on any return day the plaintiff discontinues the action or the defendant the counterclaim or judgment is given or the claim dismissed.

Counsel submitted in p. 84 of the Record of Appeal RM1,650 was allowed for advocacy by the Magistrate where this was clearly disallowed by O. 48.

After considering the arguments of the respondent's Counsel, I find merit in the argument of Counsel for the defendant and for reasons stated above, I find it is true that there are issues that should go for trial and the case could not have been disposed of summarily under O. 26A in the Subordinate Courts. I therefore allowed the appeal and set aside the judgment of the Magistrate with costs.